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Issue Date: 23 November 2004

Case No.: 2002-LHC-2644

OWCP No.: 7-162762

In the Matter of

DEMETRIOUS W. GRAVES,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

DEMETRIOUS W. GRAVES
Pro se Claimant

DONALD P. MOORE, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER ON MODIFICATION

On August 11, 2003, this Court issued a decision and order denying benefits to Claimant. On February 6, 2004, Claimant filed a request for modification with the Benefits Review Board, and the case was remanded to this Court. A rehearing was subsequently held on April 15, 2004, in Gulfport, Mississippi. On May 20, 2004, the Court issued an Interim Decision and Order Awarding Benefits. The Court awarded temporary total disability benefits from February 6, 2002, through January 28, 2004, the date that Claimant was placed at maximum medical improvement by a physical therapist. The Court retained jurisdiction over this matter to allow the parties to submit evidence of the nature and extent of Claimant's disability after January 28, 2004, the date of MMI. The following evidence has been submitted.

EVIDENCE SUBMITTED AT APRIL 15, 2004 HEARING

Claimant's Testimony

Claimant testified that he was misrepresented by his attorney in the pervious hearing. (Tr. 20). As a result, Claimant wished to use his testimony to correct any mistakes in the previous hearing's record. (Tr. 21). First, Claimant found Mr. Roll, a physical therapist who performed a functional capabilities evaluation (FCE) on Claimant, contradicted himself and was dishonest about Claimant's performances in the tests. (Tr. 21). Claimant specifically mentioned that Mr. Roll recorded the wrong heart rate. (Tr. 21).

Claimant also argued that Dr. Jackson's treatment was unfair. (Tr. 22). For instance, Claimant mentioned that Dr. Jackson released Claimant without restrictions, but did not provide an explanation as to the lack of restrictions. Dr. Jackson previously stated that Claimant had failed to comply with instructions and had experienced symptom magnification. In his testimony, Claimant asserted that he was not advised by Dr. Jackson concerning which instructions were not followed, nor does Dr. Jackson's report state that Claimant had magnified his symptoms. (Tr. 22). Furthermore, Claimant argued that Dr. Jackson was not his primary physician as Employer had asserted.

Claimant also testified that there were inaccuracies in Mr. Jimmy Albritton's testimony from the first hearing. (Tr. 29). His complaints were mainly concerning the length of time Mr. Albritton stated Complaint was at Employer's on the day he was undergoing drug testing. (Tr. 30). He also argued that it was impossible to take his drug sample to his car to destroy it and return to the office, as Mr. Albritton asserted. (Tr. 29). In general, Claimant asserted Mr. Albritton was dishonest during his testimony. (Tr. 40).

Claimant also testified to being a "Christian-hearted man." (Tr. 39). He made reference to his volunteer activities in the Youth Department at his church, and as a coach of pee-wee football and basketball. (Tr. 39). In contrast, Claimant asserted Employer has tried to cover up their safety issues. (Tr. 40). For instance, Claimant claimed the person supervising him, Ralph Little, did not have supervisor or foreman status. Claimant asserted that Mr. Little was trying to reach supervisor status by pushing Claimant to work harder in the rain on the day of his injury. (Tr. 41).

Another misunderstanding from the first hearing that Claimant tried to clarify concerned Claimant's physicians. Claimant had changed physicians during his treatment, changing his family physician from Dr. Eugene McNally to Dr. Faizon. (Tr. 42). Claimant now argues this change was not his own choice. (Tr. 43). Claimant contends he was forced to change physicians when Dr. Jackson released him and Employer refused to pay for his treatment at that time. (Tr. 45-46). Claimant also argues that the Employer has not fully reimbursed costs for medical expenses. (Tr. 47-49).

On cross-examination, Claimant stated that mentally he is unprepared to work for another employer. (Tr. 52). He also verified that he volunteers at his church and for pee-wee football. (Tr. 52-53).

Kim Graves' Testimony

Kim Graves is Claimant's wife. (Tr. 54). She testified as to their family life since Claimant was injured. Mrs. Graves specifically mentioned Claimant's sleepless nights and frustrated attitude. She also mentioned how she has to remain with Claimant at all times in order to make sure someone is there in case he has a seizure. (Tr. 55).

Testimony of Dr. Phillip L. Barnes, D.O.

Dr. Barnes is a Doctor of Osteopathy, who has been practicing in Biloxi, Mississippi for twenty-four years. (Tr. 66). Dr. Barnes first saw Claimant on December 15, 2003. (Tr. 57). Claimant had previously seen Dr. Jackson, who is a local physician. This physician wanted Claimant to have an MRI on his central nervous system; however, Claimant was unable to have one performed because of metallic fragment in his body from a prior injury. (Tr. 58). Claimant was also referred to a neurosurgeon prior to meeting with Dr. Barnes. The surgeon determined that Claimant was not a surgical candidate. (Tr. 58).

At the initial consultation with Dr. Barnes, Claimant informed him that he had fallen at work in February of the prior year and had landed on his head and right shoulder. (Tr. 57). Claimant complained of blurred vision, light headedness a couple times a week, memory problems, "jerking spells" and some instances of complete visual loss. (Tr. 57-58). During Dr. Barnes's examination he noticed that Claimant exhibited slow, measured speech and obvious memory problems. (Tr. 58). He also diagnosed Claimant as having frozen cranial bones. (Tr. 58). This condition is described as a lack of flexibility of the cranium. (Tr. 58). Dr. Barnes also stated that Claimant has a definite asymmetry of the face, stiffness in his occipital area and tenderness in his right shoulder. (Tr. 58). Dr. Barnes described an asymmetry of the face as an unequal pattern or distribution, such as the eyes are uneven. (Tr. 61).

Based on these conditions, Dr. Barnes asserted that Claimant was suffering from post-traumatic seizures, as well as definite, mild organic brain syndrome from his injury. (Tr. 58). He also ruled out a tear of Claimant's right rotator cuff. (Tr. 58). To treat this condition, Dr. Barnes started providing Claimant with cranial manipulative therapy. (Tr. 58). Through this, Dr. Barnes claimed he was able to unfreeze Claimant's cranial bones. (Tr. 58-59). He also placed Claimant on Dilantin and Phenobarbital to treat Claimant's seizures. (Tr. 59).

Dr. Barnes saw Claimant again on December 18, 2003. (Tr. 59). Claimant told Dr. Barnes that had noticed substantial improvement in his sleep and his headaches were lessening. He was still complaining of blurred vision and lightheadedness. Dr. Barnes then saw Claimant on December 22, 2003, where he noticed improvement in Claimant's facial asymmetry, a decrease in his cervical tightness and tenderness in his cervical spine. On December 29, 2003, Claimant saw Dr. Barnes and he reported that his memory and speech were improving, he had no more headaches and a better emotional attitude. (Tr. 59).

Dr. Barnes then extended the time between visits. He next saw Claimant on January 12, 2004, and noticed Claimant was still improving. (Tr. 60). Claimant informed Dr. Barnes that his neck felt much better, and his headaches and lightheadedness were improving. However, he also informed Dr. Barnes that he couldn't sleep well without the Phenobarbital. Claimant reported similar conditions when he saw Dr. Barnes on February 3, 2004. (Tr. 60).

Based on Claimant's reaction to this medication and his symptoms, Dr. Barnes concluded that Claimant's fall locked his cranial bones and impaired his neural flow and gave him tremendous spasms as well. (Tr. 60). As he was healing from this, he had memory impairment, which Dr. Barnes said is the "organic brain syndrome." (Tr. 60). Dr. Barnes also agreed that there is a possibility that Claimant's injury could cause "full-blown motor seizures." (Tr. 64). During Claimant's last visit with Dr. Barnes on April 5, 2004, he still complained of poor short-term memory and visual disturbances. (Tr. 61). Claimant reported no further pains in his right shoulder and only the occasional headaches and dizzy spells.

During cross-examination, Dr. Barnes agreed that he had not witnessed Claimant experience any motor post-traumatic seizures. (Tr. 69). However, he pointed out that not all seizures manifest themselves as motor, as they can also be emotional and cognitive. (Tr. 69). Symptoms of these types of seizures include a lack of concentration and slow speech. (Tr. 69). However, Dr. Barnes did agree that speech and memory loss can be manipulated by the speaker. (Tr. 70). Dr. Barnes did assert that while much of his diagnosis is based on the Claimant's honesty regarding his complaints, he also relied on experience and a physical examination of the Claimant. (Tr. 71-72). Based on these factors, Dr. Barnes concluded that Claimant's injury, and not a prior injury from a bullet wound, was the cause of Claimant's complaints.

Dr. Barnes affirmed that he sent Claimant to Absolute Physical Therapy, but Claimant is now discharged from therapy. (Tr. 76). Dr. Barnes also confirmed that the physical therapist's report on December 16, 2003 stated that during Claimant's first visit to Absolute Physical Therapy, he had exhibited full range of motion in his right shoulder with some breakaway weakness exhibited. (Tr. 80). Dr. Barnes also affirmed that the physical therapist's report stated that Claimant "exhibited minimal findings of possible soft tissue strain." (Tr. 81). Lastly, Dr. Barnes recalled that Claimant had expressed difficulty in working, but Dr. Barnes never addressed Claimant's ability to work in his reports.

Dr. Barnes also discussed the possibility of Claimant exhibiting symptom magnification. Dr. Barnes confirmed that Claimant did have certain characteristics that could be interpreted as symptom magnification; however, through the clinical therapeutic trial of Dilantin and Phenobarbital, Dr. Barnes concluded Claimant did not exhibit such symptoms. (Tr. 84). Dr. Barnes also admitted to not being surprised that the x-rays and CT scans returned negative results for objective signs of injury to Claimant's neck and right shoulder. (Tr. 84-85). However, he believes Claimant is still healing and without the medication he would not be as functional. (Tr. 85).

Records of Mager A. Varnado, Jr., Esq.

While representing Claimant, Mr. Varnado wrote two letters to Mr. Roll, Claimant's physical therapist. Mr. Varnado articulated several concerns he had with the FCE conducted by Mr. Roll. These included the absence of an entry regarding Claimant becoming dizzy after twelve or thirteen minutes on a treadmill, Claimant's heart rate reaching 105 to 115 bpm's rather than 95 bpm as the report stated, the lack of information on Claimant's right shoulder, and the report's contention that Claimant could lift up to fifty pounds despite Claimant's complaint that he could lift no more than fifteen pounds. (RX 1(c-d)). Mr. Varnado wrote two letters to Mr. Roll stating these concerns and requesting Mr. Roll's attention and response.

Mr. Roll responded on May 28, 2003 addressing each of Mr. Varnado's complaints. (RX 1(e)). Concerning Claimant's dizziness on the treadmill, Mr. Roll stated Claimant stopped after fifteen minutes due to complaints of pain, and his heart rate was 105 bpm. Regarding Claimant's heart rate, he stated Claimant's maximum heart rate was 185 bpm, given his age. Therefore, a rate around 100 bpm's is only about 54% of his maximum heart rate. Also, Mr. Roll found no problems with Claimant's right shoulder. Lastly, Mr. Roll argued that the report does not state that Claimant is capable of lifting fifty pounds.

Claimant also submitted a letter written by Mr. Varnado to Employer's attorney, Mr. Donald P. Moore dated April 3, 2003. (RX 1(g)). The letter requested treatment on his right shoulder from Dr. Tim Jackson, authorization for an eye exam to be done at Tri-County Eye Clinic and authorization for CT scan.

Functional Capacities Evaluation of Dr. Joe Jackson

On February 26, 2003, Dr. Jackson conducted a FCE of Claimant. (RX 2(a)). Dr. Jackson performed a series of tests to examine Claimant's ability to bend, lift, and carry items. Claimant was able to meet most of the weight and endurance goals set by Dr. Jackson. Claimant's heart rate never went over 120 bpm during any of the tests. (RX 2(d)).

Correspondence with Gulf Coast Physical Therapy

Dr. Jackson wrote a prescription on February 12, 2003, which referred Claimant to Gulf Coast Physical Therapy. Claimant's file was faxed to CorVel Corporation's Case Manager, Dee Francois. (RX 3(a)).

Letter from Claimant to Dr. Jackson

Claimant wrote Dr. Jackson on January 20, 2004 to address concerns he had regarding his file. (RX 4). Specifically, Claimant wanted information regarding the FCE conducted by Dr. Jackson. Claimant also wanted to inform Dr. Jackson that the case manager at CorVel Corporation had changed Dr. Jackson's referral from Gulf Coast Physical Therapy to Physical Therapy of Ocean Springs. (RX 4).

Functional Capacities Evaluation of Gulf Coast Physical Therapy

Gulf Coast Physical Therapy conducted this FCE at the request of Dr. Jackson. (RX 5). The report stated that Claimant needed improvement with flexibility exercises, looking up active range of motion, turning his head, upper extremity function, and pain relief. (RX 5). In order to reduce pain and return Claimant to his previous activity level and work, the report detailed a plan for treatment over the following four weeks, concentrating on flexibility, pain relief, range of motion, and education. (RX 5). James M. Spence, PT, met with Claimant twelve times from May 15, 2002 until April 17, 2002. (RX 5).

Letter from Dr. Travis B. Anderson, Pastor

Dr. Anderson submitted a letter to this Court verifying that Claimant is a member of Hillside Baptist Church. (RX 6).

Medical Form of Employer

On February 5, 2002, Claimant was given a medical pass, which documented his injury. (RX 7). The report stated Claimant had slipped and fell. The pass was issued by Ralph Little. (RX 7).

Records of Mr. Mager A. Varnado, Jr., Esq., Regarding Medical Expenses

Mr. Varnado wrote Dr. Faison on April 29, 2003 in order to ensure Dr. Faison's payment if the matter was settled. (RX 8). Also, included is a billing statement from Dr. Eugene D. McNally, which itemized treatment done by Dr. McNally. (RX 8).

Photographs of Claimant

Claimant has submitted two photographs of himself in order to document an asymmetry in his face. The first picture was taken on April 17, 2003. (RX 9). The second was taken on December 25, 2003. (RX 10).

Letter from Dr. Phillip L. Barnes, D.O.

Dr. Barnes wrote a letter verifying Claimant was under treatment for work related Post Traumatic Seizures, Organic Brain Syndrome and Chronic Cervical Neuralgia. (RX 11).

Document from the website

Claimant printed a document off the internet which provides information on post-traumatic seizures. (RX 12). This document provides data concerning when symptoms are felt and the demographics of those most likely afflicted. (RX 12).

December 16, 2003 Physical Therapy Report by Dr. Phillip L. Barnes., D.O.

Dr. Barnes first met with Claimant on December 16, 2003. Based on Claimant's complaints of right shoulder pain and neck pain, and his findings from examining Claimant, Dr. Barnes initiated a two week program for soft tissue treatment, followed by strength and conditioning treatment for Claimant's rotator cuff. Dr. Barnes' findings included light spasms in Claimant's right shoulder, breakaway weakness, and full anterior/posterior range of motion in Claimant's shoulders.

Letter from State Farm Life Insurance Company

On January 5, 2004, State Farm issued a notice to Claimant informing him that his application for life insurance was denied. (RX 14). The denial was based on Claimant's history of seizures.

EVIDENCE SUBMITTED POST-HEARING

Affidavit of Quentin McBride

Mr. McBride is an employee of Northrop Grumman Ship Systems, Inc. [NGSS] (REX 1, p. 1). For the last six years he has been employed as a Zone Manager of Production, where he supervised Claimant. (REX 1, p. 1). Mr. McBride states that NGSS does have and did have work available for Claimant as a welder within Claimant's limitations. (REX 1, p. 1). According to Mr. McBride the modified job would be available to Claimant but for his termination for failing the drug test in violation of company policy. (REX 1, p. 2).

Functional Capacity Evaluation of Gulf Coast Physical Therapy Center

On July 13, 2004, Gulf Coast Physical Therapy Center in Gulfport Mississippi issued a functional capacity evaluation to determine Claimant's physical demand category and/or occupational category. (REX 2). The report concluded that Claimant's maximum capability level was classified as "light-medium." (REX 2). This category allows for Claimant to carry 45 pounds or lift the weight from the floor to his thigh. Any lifting higher than the thigh should be 35 pounds or lighter. The report stated that Claimant's self limiting behavior along with complaints of dizziness were the primary reasons for any limitations on Claimant's capabilities. (REX 2).

Letter of Douglas G. Roll, P.T., O.C.T., FAAOMPT

On August 6, 2004, Mr. Roll, a physical therapist with Physical Therapy Center of Ocean Springs, wrote a letter evaluating Claimant's performances at each Functional Capacity Evaluation (FCE). (REX 3). Mr. Roll concluded that Claimant put forth better effort in the FCE performed by Gulf Coast Physical Therapy Center in July 2004, compared to his performance in the FCE completed by Physical Therapy Center of Ocean Springs in February 2003. Mr. Roll found that Claimant's continued sub-maximal performance made it difficult to define his maximum ability. However, according to the evaluation performed in July 2004, Mr. Roll found it medically probable that Claimant could progress to a medium level of work. (REX 3).

Vocational Rehabilitation Report of Tom Stewart, M.S., C.R.C., V.E.

On August 5, 2004, Mr. Stewart, a vocational rehabilitation counselor, issued a vocational rehabilitation evaluation. (REX 4, p. 1). Mr. Stewart developed a Residual Employment Profile and a Labor Market Survey based on Claimant's deposition of October 22, 2002, the Decision and Order issued August 11, 2003, the Functional Capacity Evaluation dated July 13, 2004, and other medical records. (REX 4, p. 1). Mr. Stewart recounted the history of Claimant's workplace injury and subsequent medical treatment as well as his personal and social background and educational and vocational history. (REX 4, p. 1-2). Based on this information, Mr. Stewart concluded that Claimant was suited for unskilled, light to light/medium jobs. (REX 4, p. 2).

Mr. Stewart conducted a labor market survey, where he identified four employers who had job openings suitable for Claimant. (REX 4, p. 2). Grand Casino Gulfport was hiring two housekeepers at rate of $7.00 per hour for 40 hours a week. The job involved cleaning casino areas, including sweeping, vacuuming, dusting, and emptying trash. None of the work required lifting more than fifteen pounds. The applicant had to be willing to work flexible hours.

Hancock Bank had an opening for a Proof Table Clerk for thirty two hours each week at a rate of $6.00 per hour. (REX 4, p. 3). The job required no previous experience, and training would be provided. The applicant was required to have a high

school diploma or GED to be eligible. The primary duties included retrieving and sorting proof work. The job is classified as unskilled with light lifting (no more than ten pounds).

Wal-mart Supercenter had two openings for cashiers at forty hours per week at $5.15 per hour. (REX 4, p. 3). No previous experience was necessary, and training was provided. The primary duties included scanning customer purchases, bagging items, and collecting payments. This job did include significant standing, but any lifting is limited to no more than ten pounds. The applicant had to be willing to work any available shift.

Family Thrift Center had an opening for a stockperson at $5.15 per hour and involved forty hour work weeks. (REX 4, p. 3). The primary duties included sorting cloths, shoes, and small appliances and placing them on the store shelving or on hangers, as well as, customer service. The job included considerable walking or standing, and occasional lifting up to twenty-five pounds, but most lifting would be less than fifteen pounds.

Medical Records of William Gasparrini, Ph.D., ABPP

In August 2004, Claimant submitted a report from Dr. Gasparrini. Claimant was referred to Dr. Gasparrini by his physician, Dr. Barnes. (RCX 1, p. 1). Dr. Gasparrini is a clinical psychologist with Applied Psychology Center. He performed a neuropsychological evaluation on Claimant on June 10, 2004. Dr. Gasparrini described Claimant's injury and any subsequent treatment Claimant received. (RCX 1, p. 1-2). Claimant reported that since the injury he has had headaches, blurred vision, and dizziness. (RCX 1, p. 2). He also stated that he has seizures that seem like a panic attack. (RCX 1, p. 2). Claimant also complained of emotional instability, including depression, mood swings and thoughts of suicide. (RCX 1, p. 2-3).

Dr. Gasparrini performed a series of tests during the clinical interview. Claimant's scoring was consistent with a borderline range of intelligence. (RCX 1, p. 4). Dr. Gasparrini concluded that the scores were not typical for individuals with organic brain syndrome secondary to head injury. (RCX 1, p. 4). Also, Claimant did not appear to have a decline in cognitive abilities resulting from his accident, and he retained good memory, attention and concentration skills. (RCX 1, p. 4).

Dr. Gasparrini also concluded that Claimant has difficulty with some types of cognitive tasks, and with tasks that require speed of performance or abstract reasoning. (RCX 1, p. 6). These problems reflect cognitive impairment that may have been exacerbated by Claimant's head injury. (RCX 1, p. 6). Dr. Gasparrini also found that Claimant shows significant depression and low energy. (RCX 1, p. 6).

In conclusion, Dr. Gasparrini found Claimant to suffer from clinically significant depression that results in low energy, motivation, speed, and strength. (RCX 1, p. 8). Claimant's neuropsychological abilities were classified as mildly impaired, but Dr. Gasparrini concluded that many of the impaired cognitive abilities may be consistent

with his pre-morbid level of intellectual functioning. (RCX 1, p. 8). Dr. Gasparrini found that these cognitive limitations will interfere with Claimant's capacity to work at any type of job other than simple labor. Thus, it seems likely that it will be difficult or impossible for Claimant to find and keep competitive employment. (RCX 1, p. 8). Dr. Gasparrini advised that Claimant participate in outpatient psychotherapy treatment for depression. (RCX 2). Claimant's treating physician, Dr. Barnes, has also issued a letter stating his agreement with Dr. Gasparrini's conclusions. (RCX 3). Following this advice, Claimant has enrolled as a client of Gulf Coast Mental Health Center, where he is receiving treatment for depression. (RCX 4).

November 17, 2004 letter from Gulf Coast Mental Health Center

Ann Herrington, a mental health clinician at Gulf Coast Mental Health Center, states Claimant has attended therapy on four occasions since August 2004. Claimant's diagnosis is 309.0 Adjustment Disorder with Depressed Mood, rule-out 296.22 Major Depressive Disorder Single Episode, Moderate. (RCX 5)

Medical Records of John W. Davis, Ph.D.

Dr. Davis is a psychologist who examined Claimant at the request of Employer on October 11, 2004. Claimant gave the history of his February 2002 workplace injury and subsequent disorders and treatment. (REX 5, p. 1). Claimant reported he had seen psychiatrists and neurologists and had undergone physical therapy. (REX 5, p. 1). Since the workplace injury, Claimant has reported pain in the right side of his neck, right shoulder, and back. (REX 5, p. 1). He also complains of seizures, headaches, dizziness, back pain, trouble sleeping, and states that he is currently being treated by Dr. Barnes for these. (REX 5, p. 1). Dr. Barnes has prescribed Dilantin, Phenobarbital, Clonazepam, Tramadol, Ultram, Ibruprofen, and Lexapro. (REX 5, p. 1).[1]

Dr. Davis performed a variety of neuropsychological tests in order to determine Claimant's cognitive functioning, personality resources and limitations. (REX 5, p. 1). Dr. Davis performed a Wechsler Adult Intelligence Test – Third Edition [WAIS-III], in which Claimant scored a Full Scale IQ of 75, placing him in the borderline range of intelligence. (REX 5, p. 1). Dr. Davis also preformed a Wide Range Achievement Test – 3, and Bender test. The results for these tests were consistent with a person with limited intellectual capacity and suggested Claimant has a life-long history of mental slowness, but has had adequate intellectual abilities for adult functioning. (REX 5, p. 6). Dr. Davis concluded these tests showed no indication of any dementia, impairment, or other features that would be consistent with a two year old head injury. (REX 5, p. 6).

Dr. Davis also prepared a personality profile to assess Claimant's emotional discomforts, social difficulties, and problems with rehabilitative or work issues. (REX 5,

[1] Claimant Motion to Dismiss the Reports of Dr. John Davis is denied. The Court will consider the arguments made therein when considering the weight to accord to Dr. Davis' opinions.

p. 6). He concluded that Claimant's profile shows anxiety, depression, and some paranoia about his situation. (REX 5, p. 6). According to Dr. Davis, Claimant has developed a sense of entitlement and a victimization frame of reference. (REX 5, p. 7). Dr. Davis finds these factors to be consistent with a depressive order and anxiety, and the seizures Claimant complains of are related more to this anxiety then neurological impairment. (REX 5, p. 7). Dr. Davis diagnosed Claimant as having depression with anxiety. (REX 5, p. 7).

Dr. Davis concluded that there are no psychological limitations or restrictions. (REX 5, p. 7). According to his observations, Claimant is unlikely to change his motivation to return to work until all claims and litigation are concluded. Dr. Davis has found that Claimant has brought much of this on himself and has locked himself into an adversarial position. (REX 5, p. 7). His recommendation is for Claimant to return to work in order to get his mind off the present situation. (REX 5, p. 7).

DISCUSSION

Credibility

Nothing presented has changed the Court's previous opinion concerning the credibility of the witnesses. While Claimant asserts Mr. Albritton was dishonest during his testimony, the Court found Mr. Albritton to be a credible witness concerning the circumstances of Claimant's drug test. Claimant also asserts Mr. Roll, a physical therapist, was dishonest. Other than Claimant's disagreement, the Court finds no reason to question Mr. Roll's observations during the FCE.

Issues

The issues to be addressed at the hearing conducted in June 2003 were 1) nature and extent of disability, including maximum medical improvement and whether Claimant had a loss of wage earning capacity; 2) authorization for current medical treatment; 3) other assessments; 4) attorney's fees; and 5) Employer's credit for compensation and wages paid. At the hearing the parties stipulated that Claimant suffered an injury in the course and scope of his employment. (JX 1). Based on the medical records submitted at the hearing and the treatment received, the Court finds the "stipulated injury" to include the back, neck and right shoulder and arm. These were the injuries that were addressed and treated by Drs. Jackson, Connolly and Danielson. (EXs. 7-9). At the June 2003 hearing Claimant testified concerning vision problems and headaches and from this testimony and the cross-examination it is clear that the Parties did not consider the vision problems and headaches part of the stipulated injury. At the hearing in April 2004, Claimant for the first time presented evidence of seizures. Additionally, in an August 2004 submission, for the first time Claimant has presented evidence of psychiatric injury. The Court will address the causation of these injuries.

Causation

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant proves these elements, the claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prima facie case, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. The relative contributions of the work-related injury and prior condition are not weighted in determining Claimant's entitlement ("aggravation rule"). Wheatley, 407 F.2d at 307.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a Claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690.

As a result of a successful rebuttal of the presumption by the Employer, the fact finder must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982). I must weigh all the evidence in the record and render a decision supported by substantial evidence. See Del Vecchio, 296 U.S. 280 (1935).

The vision and headache problems:

Claimant was injured when he fell landing on his right side and then struck his head. During his first visit with Dr. Jackson, Claimant related that he had headaches and associated blurred vision. While Dr. Jackson found no problems with visual tracking and no visual loss on confrontational testing, Dr. Jackson did recommend that Claimant see an ophthalmologist. (Ex. 8, p.7). I find that Claimant has established that he has headaches and vision problems. I also find that the fall and blow to the head that Claimant sustained could cause such an injury. I find that Claimant has established a prima facie case and is entitled to a presumption that the vision and headache problems arose out of the employment.

Employer has presented no evidence that Claimant's vision and headache problems were not caused by the work accident. Accordingly, I find Claimant's vision and headache problems were caused by his work related accident.

The seizures:

In December 2003, Claimant reported to Dr. Barnes that he suffered from "jerking spells." Dr. Barnes concluded that Claimant's fall locked his cranial bones and impaired his neural flow and gave him tremendous spasms. Neither Dr. Barnes nor any other doctor has witnessed Claimant experience any motor post-traumatic seizures. Claimant never mentioned to any of his prior physicians that he was suffering from seizures (although he mentioned that his brother had seizures in the history taken by Dr. Jackson). (Ex. 8, p.2). There was no mention of seizures at the June 2003 hearing. There is no evidence as to why the seizures would suddenly appear almost two years post-accident. While I find that the fall and blow to the head that Claimant sustained could cause such an injury, I find that Claimant has not established that he has seizure problems. I find that Claimant has not established a prima facie case and is not entitled to a presumption that the seizures arose out of the employment.

Even if the Court were to find that Claimant had established a prima facie case and was entitled to the 20(a) presumption, the Court finds Employer has rebutted the presumption and the weight of the evidence establishes any seizures are not caused by Claimant's employment. As noted above, Claimant never mentioned seizures to Drs. Jackson, Culverhouse, Connolly or Danielson. There is no evidence that Claimant ever mentioned seizures on any form filed with Employer or the DOL. Seizures were not mentioned at the hearing in June 2003 although Claimant mentioned his other problems. There is no evidence as to why the seizures would suddenly appear almost two years post-accident. I find the weight of the evidence does not establish any seizures are the result of Claimant's work place injury.

The psychiatric injury:

In August 2004, Claimant submitted a report from Dr. Gasparrini. Dr. Gasparrini performed a series of tests during the clinical interview. Claimant's scoring was

consistent with a borderline range of intelligence. Dr. Gasparrini concluded that the scores were not typical for individuals with organic brain syndrome secondary to head injury. Also, Claimant did not appear to have a decline in cognitive abilities resulting from his accident, and he retained good memory, attention and concentration skills.

Dr. Gasparrini also concluded that Claimant has difficulty with some types of cognitive tasks, and with tasks that require speed of performance or abstract reasoning. These problems reflect cognitive impairment that may have been exacerbated by Claimant's head injury. Claimant's diagnosis is 309.0 Adjustment Disorder with Depressed Mood.

I find that Claimant has shown he suffered a psychiatric harm and that employment conditions existed which could have caused, aggravated or accelerated the condition.

I further find that Employer has successfully rebutted the presumption. Dr. Davis found no indication of any dementia, impairment or other features that would be consistent with a two year old head injury. Dr. Davis found Claimant's depression and anxiety to be the result of his sense of entitlement and victimization.

While Dr. Gasparrini found Claimant to be depressed, he also found Claimant's test scores were not typical for individuals with organic brain syndrome secondary to head injury. While in one paragraph Dr. Gasparrini opines that Claimant's cognitive impairment may have been exacerbated by Claimant's head injury, he provides no rational for this conclusion. This is particularly disturbing as he had previously stated Claimant did not appear to have a decline in cognitive abilities resulting from his accident and Claimant retained good memory, attention and concentration skills. While Dr. Gasparrini opined that Claimant's cognitive limitations will interfere with his capacity to work at any type of job other than simple labor, Claimant did successfully work prior to his injury and operated a private business post-injury in addition to coaching pee wee league football and basketball. (CX. 11, p.8). Dr. Gasparrini provides nothing to dispute Dr. Davis' conclusion that the tests showed no indication of any dementia, impairment or other features that would be consistent with a two year old head injury. Evaluating all the evidence of record, I find Claimant's psychiatric problems are not the result of his work place accident.

Nature and Extent of Disability

In March 2003, Dr. Jackson released Claimant to return to work without restrictions and placed Claimant at MMI. In the Court's Interim Decision and Order, the Court found Claimant did not reach MMI until January 28, 2004. (RX. 13, Tr. 76).

Suitable Alternative Employment

According to Mr. McBride, Employer has a "modified position" available for Claimant. Based on this statement and lack of other evidence of the nature of

Claimant's duties before his accident, the Court finds Claimant cannot return to his previous employment and has established a prima facie case for total disability.

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Moveable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevendores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevendores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-42. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbuilding. & Dry Dock Co., 9 BRBS 473, 477-80 (1980). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lyeks Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may

average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3d 326 (5th Cir. 1998).

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work. Walters v. Ingalls Shipbldg., Inc., 31 BRBS 75 (CRT) (5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breeching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); see also Harrod v. Newport News Shipbldg. & Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbldg., Inc., 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

In this case, as evidence of suitable alternative employment, Employer offered the affidavit of Mr. McBride, a Zone Manager with NGSS. (EX 1). Mr. McBride stated that NGSS does have and did have work available for Claimant as a welder within the limits detailed in the FCE. The Court notes that in addition to meeting the limits detailed in the FCE, Dr. Davis concluded there are no psychological limitations or restrictions. The Court finds this position is suitable for Claimant. Mr. McBride testified this job would be available to Claimant but for his termination for violation of company policy in failing the drug test. As in the original decision and order, I find Employer has met its burden by providing a job to Claimant that is within his restrictions. The Court finds Claimant's prospective post-injury earnings would have fairly and reasonably represented his post-injury wage earning capacity because there is no evidence that Claimant could not have continued to earn his pre-injury wages had he not been terminated. The Court finds Employer has no duty to pay further compensation benefits after January 28, 2004.

Although not necessary for this decision, I further find Employer has shown other suitable alternative employment. Employer offered the report of Mr. Stewart, a vocational consultant who found four employers with job opportunities available within Claimant's restrictions and in his immediate geographical area. (EX 4). The jobs were two housekeeping positions, a clerk position, two cashier positions, and a stockperson position. The jobs ranged in pay from $7.00 per hour to $5.15 per hour. None of these jobs involved extensive lifting or a high degree of skill. These positions are well within Claimant's physical demand category of light-medium as defined by the functional capacity evaluations. Furthermore, each position would provide any training that was needed and did not require any education beyond a high school diploma or a GED. Claimant's scores in each neuropsychological evaluation demonstrate that he is qualified for these types of positions. While Claimant indicates in his Motion to Dismiss Reports of Dr. John Davis that he contacted the personnel manager of all the positions,

he does not indicate that he applied for any position. Of these he only indicates two which are not suitable, one because it would require working evenings and the other because of lifting requirements. Claimant has provided no evidence that any of these prospective employers would not hire him because of his limitations. In fact, Claimant has not sought any employment since his injury. Accordingly, I find that Employer has satisfied its burden of showing that suitable alternative employment paying $6.07 per hour ($7.00 + $5.15 divided by 2 = $6.07 per hour) for Claimant existed.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability payments for the time period from February 6, 2002, through January 28, 2004, based upon an average weekly wage of $574.76.

2. Employer shall receive a credit for benefits and wages paid.

3. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

4. Employer shall continue to be responsible for all reasonable and necessary medical expenses related to Claimant's neck, back and shoulder injuries and vision and headache problems that are related to his accident of February 5, 2002, pursuant to § 7 of the Act.

5. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

ORDERED this 23rd day of November, 2004, at Newport News, Virginia.

A

LARRY W. PRICE
Administrative Law Judge

LWP